

FEDERAL COURT OF AUSTRALIA

Ejueyitsi v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 328

MIGRATION – appeal from Federal Magistrate’s decision – application for spouse visa and invocation of special provisions relating to domestic violence in Migration Regulations 1994 (Cth) – whether Migration Review Tribunal (“MRT”) erred by imposing burden of proof upon applicant to establish genuine and continuing spousal relationship – whether futile to remit matter to MRT or Federal Magistrates Court by reason of MRT’s findings in relation to domestic violence exception contained in Div 1.5 of Migration Regulations 1994 (Cth)

Alin v Minister for Immigration and Multicultural Affairs [2002] FCA 979 considered
Bushell v Repatriation Commission (1992) 175 CLR 408 referred to
Cakmak v Minister for Immigration & Multicultural Affairs [2003] FCA 503 referred to
Du v Minister for Immigration & Multicultural Affairs [2000] FCA 1115 considered
Huang v Minister for Immigration & Multicultural Affairs [2001] FCA 901 followed
Ibrahim v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1279 referred to
Kozel v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 138 FCR 181 referred to
Ladic v Capital Territory Health Commission (1982) 5 ALN N60 referred to
McDonald v Director-General of Social Security (1984) 1 FCR 354 referred to
Meroka v Minister for Immigration and Multicultural Affairs (2002) 117 FCR 251 approved
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 distinguished
Minister for Immigration and Multicultural Affairs v Hughes (1999) 86 FCR 567 referred to
Minister for Immigration & Multicultural & Indigenous Affairs v VSAF of 2003 [2005] FCAFC 73 distinguished
Re Elkington and Minister for Immigration and Ethnic Affairs (1982) 5 ALN N196 referred to
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162 applied

**VINCENT BABATUNDIE EJUEYITSI v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS and MIGRATION REVIEW
TRIBUNAL**

VID 1511 OF 2004

**WEINBERG J
4 APRIL 2006
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 1511 OF 2004

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: VINCENT BABATUNDIE EJUEYITSI
 APPELLANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 FIRST RESPONDENT**

**MIGRATION REVIEW TRIBUNAL
SECOND RESPONDENT**

JUDGE: WEINBERG J

DATE OF ORDER: 4 APRIL 2006

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The Migration Review Tribunal be joined as a respondent to this proceeding.
2. The appeal be allowed.
3. The decision of the Federal Magistrate dismissing the application for review, and his Honour's order that the appellant pay the respondent's costs, be set aside.
4. The matter be remitted to the Federal Magistrates Court to be determined according to law.
5. The costs of the previous proceeding before the Federal Magistrate, together with the future costs of that proceeding, be reserved.
6. The first respondent pay the appellant's costs of this appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
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**MIGRATION REVIEW TRIBUNAL
SECOND RESPONDENT**

**JUDGE: WEINBERG J
DATE: 4 APRIL 2006
PLACE: MELBOURNE**

REASONS FOR JUDGMENT

- 1 This is an appeal from a decision of a Federal Magistrate dismissing an application for review of a decision of the Migration Review Tribunal (“the MRT”): *Ejueyitsi v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FMCA 935. The primary issue raised on the appeal is whether the MRT erred in law by determining the appellant’s case on the basis that he carried a persuasive burden of proof. There is also a secondary issue as to whether the MRT’s decision could have been different, in any event, having regard to the requirements of the Migration Regulations 1994 (Cth) (“the Regulations”). That secondary issue relates essentially to what relief, if any, the appellant may be entitled to even if he succeeds on his primary ground.

FACTUAL BACKGROUND

- 2 The appellant is a citizen of Nigeria who was born on 7 January 1961. He arrived in Australia on 13 April 1997 on a student visa that was valid until 15 March 1998. He was granted a further student visa valid until 7 May 2000.

3 On 28 February 1999, the appellant married Nola Khan, an Australian citizen (“the nominator”). On 12 April 1999, he lodged an application for a Class TK Extended Eligibility (Temporary) subclass 820 (spouse) visa (“the spouse visa”). The appellant and the nominator were both interviewed by a Departmental officer on 22 June 1999. On 29 June 1999, the nominator withdrew her support for the application on the basis that the relationship had ended.

4 The appellant then sought to rely upon the domestic violence exception contained in Div 1.5 of the Regulations. That exception enables an applicant for a spouse visa who is no longer living in a continuing relationship with his or her spouse at the time of the visa decision to maintain the claim for that visa.

5 On 30 April 2002, the respondent Minister’s delegate refused the application on various grounds. These included a finding that the relationship had not been genuine at the time of application, and a further finding that the requirements of reg 1.26, dealing with statutory declarations by “competent persons”, had not been met.

6 On 27 May 2002, the appellant applied to the MRT for review of the delegate’s decision. On 16 June 2004, the MRT affirmed that decision. The appellant then sought review of the MRT’s decision in the Federal Magistrates Court. On 23 November 2004, that application was dismissed. On 9 December 2004, a notice of appeal was filed, it appears by the appellant in person. Subsequently, I directed that the appellant be referred to the Registrar for referral to a legal practitioner for pro bono assistance. That was done. On 18 April 2005, the appellant filed detailed contentions that were prepared by counsel. The respondent filed contentions in reply on 17 May 2005.

THE MRT’S DECISION

7 The MRT accepted that the appellant had met the nominator in Perth in or about July 1997. At that time, he was living and studying in Victoria. They remained in touch, and the appellant eventually moved to Perth in about August 1998. They commenced living together in about January 1999, and were married on 28 February 1999.

8 The MRT found that the relationship between the appellant and the nominator swiftly deteriorated. The appellant submitted a statement to the MRT in which he outlined the

circumstances of the breakdown of the relationship. He claimed, inter alia, that the nominator had become “aggressive” and “violently abusive”, and recounted three incidents which took place in March, May and June 1999. In the May incident (actually 24 May 1999), the nominator badly damaged two cars owned by the appellant, which led to him moving out of her house for several days. In the June 1999 incident, the nominator threatened him with a knife. After that incident, the appellant moved out permanently.

9 The MRT stated, as its reason for refusing the appellant’s application:

“36. Other than the evidence of the Applicant, there is no independent reliable evidence attesting to the state of the relationship from family or friends. Whilst the Tribunal is satisfied that the Applicant and Ms Khan may have shared some form of a relationship after the Applicant’s move to Perth in or around September 1998 and when the marriage broke up at the end of June 1999 the Tribunal finds that the relationship falls short of a genuine and continuing married relationship as required by law. It would be fair to described [sic] as lacking the evidence relating to indices of such a relationship as set out regulation 1.15A of the Regulations.

*37. When considering the question of **burden of proof** in administrative review, the Tribunal is guided by various Administrative Appeals Tribunal (‘AAT’) [sic] and the Federal Court on the subject. Whilst acknowledging that an administrative tribunal should not ‘seek to determine matters ... by strict application of the rules related to onus of proof’, Senior Member Ballard in Re Caruana and Australian Telecommunications Commission (1982) 5ALN N30 nevertheless said that ‘regard must be had to the application of those rules ... in determining **which party has the responsibility of satisfying the Tribunal as to any given fact**’. (See also Re Elkington and Minister for Immigration and Ethnic Affairs (1982) 5 ALN N196). His Honour Fox J in Ladic v Capital Territory Health Commission (1982) 5 ALN N60 said (at N61) that,*

‘the term ‘onus of proof’ (or ‘burden of proof’) ... was a legal burden, or requirement and could, as a matter of common sense, be said to have rested with the party seeking the result’

38. This view was endorsed by Deputy President Todd in an AAT decision Re Holbrook and Australian Postal Commission (1983) 5 ALN N146 when he said that,

‘as a matter of common sense’, to use His Honour’s words, **he who asserts, or he seeks a result, must prove. Such proof must make possible a finding, from the whole of the evidence and on the balance of probabilities, of the facts that are fundamental to a claim.’** (emphasis added)

39. In McDonald v Director-General of Social Security (1984) 6 ALD 6, the Federal Court was again anxious to avoid the onus terminology. The result flowing from the Court’s dicta however does not appear to be much

different from that raised by the decisions referred to above. When the whole of the evidence has been considered against the statutory requirements and the Tribunal is left in a state of uncertainty as to whether the facts necessary to activate the relevant statutory power have been established it must decide against the exercise of the power.

40. The Tribunal finds that the Applicant has not discharged the ‘common sense’ burden of establishing the facts necessary to enable the Tribunal to reach a finding on the critical issue. The Tribunal is unable to reach a finding that the Applicant was the spouse of Ms Khan at the time of lodgement of the primary application.” (emphasis added)

10 The MRT went on to say that, by reason of its findings, as set out above, it was not necessary to consider whether the domestic violence provisions of the Regulations applied. However, in the event that it was wrong in its finding that the appellant was not in a spouse relationship at the time of lodgement of the primary application, and given that it was common ground that the relationship between the appellant and the nominator had ended, it would assess whether he had suffered domestic violence committed by the nominator, pursuant to cl 820.221(3)(b) of Sch 2 of the Regulations.

11 After setting out in detail the “special provisions relating to domestic violence” found in Div 1.5, the MRT noted that they formed the evidentiary framework within which domestic violence was deemed to have occurred. Regulation 1.23 defined domestic violence, and set out the circumstances in which a person was to be taken to have suffered such domestic violence.

12 The MRT noted that the provisions of Div 1 had been extensively considered by the Federal Court, and that the Division had been described variously as “a deeming mechanism”: *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251 (“*Meroka*”) at [5]; a “triumph of form over substance”: *Ibrahim v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1279 (“*Ibrahim*”) at [40]; and as a “mechanical mode of proof”: *Cakmak v Minister for Immigration & Multicultural Affairs* [2003] FCA 503 at [40].

13 The MRT then stated that it was established law that it was not its role, nor that of any decision maker, to assess whether domestic violence had taken place. In the words of Ryan J in *Kozel v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 181 (“*Kozel*”), it was “the Tribunal’s responsibility to assess whether statutory

declarations have been furnished which express the opinions mandated by reg 1.26”.

14 It should be noted that reg 1.26 is in the following terms:

“1.26 Statutory declaration by competent person

A statutory declaration under this regulation:

- (a) must be made by a competent person; and*
- (b) must set out the basis of the competent person’s claim to be a competent person for the purposes of this Division; and*
- (c) must state that, in the competent person’s opinion, relevant domestic violence (within the meaning of paragraph 1.23 (2) (b)) has been suffered by a person; and*
- (d) must name the person who, in the opinion of the competent person, has suffered that relevant domestic violence; and*
- (e) must name the person who, in the opinion of the competent person, committed that relevant domestic violence; and*
- (f) must set out the evidence on which the competent person’s opinion is based.”*

15 It should also be noted that reg 1.24(1)(a)(ii) provides that the evidence that may be relied upon to support a contention that a person has suffered or committed domestic violence includes:

“a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory”.

16 In summary, the MRT found that the statutory declarations upon which the appellant relied to satisfy the requirements of reg 1.26, namely those of Dr Norman Van Dort, a general practitioner, and Ms Cozette Esma Fraser, a social worker, both of whom had seen the appellant after the alleged domestic violence, did not name the person who, in the opinion of the competent person, had *suffered* the relevant domestic violence, did not name the person who, in the opinion of the competent person, *committed* that relevant violence, and did not set out the evidence on which the competent person’s opinion was based.

17 In addition, the MRT found that two police reports, in relation to the May 1999 incident, did not meet the requirements of reg 1.24(1)(a)(ii) because they were not records of an assault on the alleged victim, allegedly committed by the alleged perpetrator. In the MRT’s words:

“Neither of the police reports referred to above recorded any assault on the

Applicant allegedly committed by Ms Khan. It only referred to certain alleged acts of damage to property.”

- 18 It followed that as neither of the statutory declarations, nor the police reports, were found to have met the requirements prescribed by the Regulations, the appellant could not be “taken” to have suffered domestic violence within the meaning of those Regulations. The criterion described under cl 820.221(3)(b) was not met.

THE FEDERAL MAGISTRATE’S JUDGMENT

- 19 The Federal Magistrate acknowledged that the MRT’s reference to “the ‘common sense’ burden of establishing the facts” in [40] of the MRT’s reasons for decision was “unfortunate”. Indeed, his Honour noted that the Minister had acknowledged that the MRT’s use of this terminology may have been “inappropriate”.

- 20 Nevertheless, the Federal Magistrate went on to conclude at [21] and [22]:

“Reading its reasons carefully, however, and noting that it should avoid the “onus” terminology (see McDonald v Director-General of Social Security (1984) 6 ALD 6), I am prepared to conclude in the present case that the MRT has indeed simply embarked upon its task in a way which led it to a conclusion that it was not satisfied that the evidence before it would allow it to conclude that the relationship in this instance was one of a genuine and continuing married relationship as required by law. Although in paragraph 40 of its decision the MRT states it is “unable to reach a finding that the applicant was the spouse of Ms Khan at the time of lodgement of the primary application”, it did so, unfortunately, in the context of that same paragraph where it referred to the “commonsense burden of establishing the facts”. Although that is an unfortunate occurrence in terms of the reasoning and the manner in which the MRT has expressed its findings, I am not prepared to conclude that it has in reality done anything more than indicate that it was not satisfied that the appropriate relationship existed as required by law.

It seems to me that that principal finding in paragraph 36 of the MRT’s decision is not tainted or indeed rendered fatal by the subsequent discussion of the law in relation to a burden of proof. Indeed, it may simply be that the MRT was grappling with the concept of burden of proof against the backdrop of correctly reciting appropriate authorities where it is clear that the application of the rules related to onus of proof are not appropriate for the tribunal and where it is clear that in all the circumstances the MRT had after reciting the arguments advanced on behalf of the applicant who was represented simply made appropriate findings that it was not satisfied in relation to the key issue to be resolved, namely whether or not the applicant and the nominator were in a relationship of a kind required by law for the purposes of the visa application. It had after all considered the statutory

declarations and other material before it and did so in the course of its reasoning as required.”

21 Having made the findings set out above, in relation to [36] of the MRT’s reasons, his Honour concluded that it was unnecessary to go any further and consider the remaining grounds of appeal. These additional grounds challenged the MRT’s findings regarding the statutory declarations and the police reports. They contended that the MRT had erred in failing to be satisfied that the domestic violence exception was made out.

THE APPELLANT’S CONTENTIONS ON APPEAL

22 Mr Horan, who appeared on behalf of the appellant, pro bono, referred firstly to the relevant provisions of the Regulations. These are set out at length at [7] of the Federal Magistrate’s reasons for judgment, and it is unnecessary to replicate them here.

23 It is sufficient, for present purposes, to note that cl 820.211(2)(a) of Sch 2 requires that, at the time of application (in this case 12 April 1999), the applicant must be the spouse of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen. Under reg 1.15A, a person is the “spouse” of another person if the two persons are in a married relationship within the meaning of sub-reg (1A). They must be married to each other under a valid marriage, and the Minister must be satisfied that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship is genuine and continuing, and that they live together, or do not live separately and apart, on a permanent basis.

24 In forming an opinion as to whether the two persons are in a married relationship, the Minister must have regard to all of the circumstances of the relationship including, in particular, the matters prescribed by reg 1.15A(3) relating to the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of their respective commitment to each other.

25 Mr Horan submitted that, in the present case, the MRT had been required to make a finding as to whether the appellant was relevantly the “spouse” of the nominator within the meaning of reg 1.15A. That, in turn, required the MRT to make a finding as to whether their relationship was genuine and continuing, as at the time of application, and in doing so to take

into account the matters set out in reg 1.15A(3).

26 Mr Horan submitted that the MRT did not make a finding, on the evidence, as to these matters. It simply concluded that, in the absence of “reliable” evidence, it was unable to “reach a finding on the critical issue”, as expressed in [40] of its reasons for decision. He submitted that when the MRT’s reasons for decision were read as a whole, it was apparent that it had impermissibly imposed a burden of proof upon the appellant, and thereby committed jurisdictional error.

27 In developing that submission, Mr Horan argued that the concept of onus of proof has no place in administrative proceedings, such as those conducted by the MRT. He referred to *McDonald v Director-General of Social Security* (1984) 1 FCR 354 (“*McDonald*”) at 356-7 per Woodward J, 365-6 per Northrop J and 369 per Jenkinson J; *Minister for Immigration and Multicultural Affairs v Hughes* (1999) 86 FCR 567 at [35] per Merkel J, with whom Carr J agreed; and *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-5 per Brennan J. He submitted that such proceedings are not adversarial in nature. The MRT is an inquisitorial body which has powers to make inquiries and to obtain additional information. It is not a curial body that decides cases in accordance with principles of evidence, or by determining the incidence of the burden of proof.

28 Mr Horan argued that when the MRT asserted that there was “no reliable evidence... regarding the pooling of financial resources or the sharing of household expenses” or “the domestic and social aspects of the relationship” and “no independent reliable evidence attesting to the state of relationship from family or friends”, it was essentially determining the issue before it, not on the basis of the evidence as it stood, but rather on the basis of the absence of evidence that might have been presented. Indeed, the MRT, at [36] of its reasons for decision, described the position presented to it as “lacking the evidence relating to the indices of such a [genuine and continuing] relationship as set out [in] regulation 1.15A of the Regulations”.

29 Mr Horan supported this argument by noting that the MRT did not, explicitly, reject the appellant’s evidence regarding his relationship with the nominator. Indeed, it stated, at [36], that it was “satisfied that the Applicant and Ms Khan may have shared some form of a relationship after the Applicant’s move to Perth in or around September 1998”. In

Mr Horan's submission, it was simply the lack of independent, reliable evidence that led the MRT to reject the appellant's claim, and that was essentially because he had not discharged the onus that the MRT had wrongly required him to carry.

30 Mr Horan recognised that the MRT had expressly acknowledged at [37] of its reasons for decision that it should not "seek to determine matters ... by strict application of the rules related to onus of proof", and had cited authority for that proposition. He noted, however, that that statement, which was itself unexceptionable, was immediately followed by the various references to onus of proof, or burden of proof, set out at [37] and [38] of the reasons for decision. He submitted that the MRT's belief that the Full Court's admonition in *McDonald* to avoid such terminology could be reconciled with the very different approach taken in *Re Elkington and Minister for Immigration and Ethnic Affairs* (1982) 5 ALN N196 and *Ladic v Capital Territory Health Commission* (1982) 5 ALN N60, the cases to which the MRT referred, indicated that it had not understood the full significance of what the Full Court had said upon this subject.

31 Finally, Mr Horan submitted that irrespective of whether the MRT had, at one point, formulated the law correctly when it stated that an administrative tribunal should not determine matters by applying the rules relating to onus of proof, it had plainly gone badly wrong by what it ultimately said in [40]. At [40], the MRT's reasons were to the effect that the appellant had failed because he had not "discharged the 'common sense' burden" that rested upon him to establish the facts necessary to enable the MRT to reach a finding on the critical issue. He noted that the MRT had not gone on to say that it was not satisfied that the appellant was the spouse of the nominator at the time of lodgement of the primary application, but had merely stated that it was "unable to reach a finding" on that point. He submitted that, couched in those terms, it was clear that the MRT had, improperly, imposed upon the appellant a persuasive burden of proof. This, he submitted, amounted to jurisdictional error.

32 Mr Horan referred to, and relied upon, what he submitted was an analogous case, *Huang v Minister for Immigration & Multicultural Affairs* [2001] FCA 901 ("*Huang*") at [21]-[26]. In that case, Drummond J set aside a decision of the Immigration Review Tribunal ("the IRT") (the predecessor to the MRT) the reasoning of which had been in very similar terms to that of the MRT in the present case. Mr Horan submitted that, contrary to the judgment of the

Federal Magistrate below, the MRT's finding in this case was tainted by its failure properly to grasp the principles applicable to administrative proceedings, at least in relation to matters such as the incidence of the burden of proof.

33 In *Huang*, the question that arose for determination was whether the IRT's comments, in its reasons for decision, indicated that it had disposed of the case against the applicant by deliberately refraining from making findings on relevant matters. It was said to have done so because it considered that the responsibility for clarifying the relevant facts rested with the applicant, and she had failed to discharge the onus she bore in that regard.

34 The particular passage at [25] in the IRT's reasons for decision that gave rise to this issue was the following:

"An applicant for a visa needs to satisfy all of the criteria set out in the legislation for that visa. If the Tribunal is uncertain or unable, on balance, to find whether the facts exist to entitle the Applicant to the visa sought, a decision is to be made against her (see Re Ferreras, IRT Decision 299, 2 September 1991)."

35 The IRT went on to say that the visa applicant, "on balance", had been unable to satisfy the particular requirements of the Regulations.

36 Speaking of these passages, Drummond J stated at [18]-[26]:

"The respondent submitted that the significance of what the Tribunal said in par [25] was to be found in s 65 of the Act. Before the decision-maker (whether that be the Minister, his delegate or the Tribunal) is entitled to grant a visa of the kind sought by the applicant, the decision-maker must be satisfied, among other things, that the other criteria (ie, other than the health criteria) for the visa in question that are prescribed by this Act or the Regulations have been satisfied: see s 65(1)(a)(ii). It was then submitted that all the Tribunal did by making the comments in par [25] was acknowledge that the task for it in determining whether to grant the applicant her student visa in accordance with s 65(1)(a)(ii) was to determine whether, at the end of the day, it was satisfied that criterion 560.213 was complied with, which required it to be satisfied that condition 8202 was substantially complied with. It was said that par [25] should not be read as a statement by the Tribunal that it approached the case on the basis that the applicant must fail unless she discharged the persuasive burden of proving to the civil standard of proof the facts necessary to show that this particular criterion and this condition had been complied with, ie, the facts necessary to show that she was entitled to the visa she sought."

Respondent's counsel, correctly in my opinion, accepted that common law concepts of onus of proof have no role in proceedings in the Migration Review Tribunal. See McDonald v Director-General of Social Security (1984) 1 FCR 354 at 356 - 357, 366 and 369; Cam v Minister for Immigration and Multicultural Affairs (1998) 84 FCR 14 and cf Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 282 - 283. (To say that notions of onus of proof are irrelevant is not, however, to say that it is not in some circumstances appropriate for the Tribunal to have regard to common law standards of proof, as opposed to the incidence of the burden of proof, and to reach conclusions of fact on some matters only if satisfied as to the existence of those facts "on the balance of probabilities arising from the available information before the decision-maker". See Minister for Immigration and Multicultural Affairs v Epeabaka (1999) 84 FCR 411 at 417 - 420.)

These competing submissions necessarily invite the Court to determine just how the Tribunal reasoned its way to dismissing the applicant's application on this ground. I was reminded that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon judicial review by over-zealously seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed: Wu Shan Liang at 272. This principle of judicial restraint applies to all reviewable administrative decisions including those of the Tribunal. But it does not, I think, apply in the same way to all such decisions. The rigour with which it constrains a court in examining a decision-maker's reasons will reflect the nature and role of the particular decision-maker. Members of the Migration Review Tribunal perform a significantly different function from public servants in the mainstream of federal executive activity who, from time to time, are called upon to make administrative decisions as part of a range of duties conferred on them. The Tribunal is a specialist decision-maker charged with reviewing lower-level administrative decisions. The obligation imposed by s 368 of the Migration Act 1958 (Cth) to provide in written form both reasons and findings, in the context of its decisions being subject to judicial review, shows that the Parliament expects the Tribunal to be capable of giving a coherent and informative explanation for how it reaches its ultimate conclusion for or against an applicant. The principle of restraint is one that cautions against too zealous a search for error. It is not a principle that immunises the Tribunal's reasoning from that critical examination which is part and parcel of the function of a court charged with review of the Tribunal's decision to see if it is flawed with reviewable error of the kinds listed in s 476 of the Act.

In Re Ferreras [1991] IRTA 299 (2 September 1991), the Immigration Review Tribunal reviewed the refusal to grant the applicant a visitor visa. It set out in par [7] of its reasons the criteria prescribed for the grant of such a visa and, in pars [11] to [13], turned to two of those criteria, saying:

"Criteria J and K comprise what is now commonly classified as the 'bona fides' requirement. They effectively prescribe that the Tribunal must be satisfied on the balance of probabilities that the principal's proposed visit to Australia is 'genuine' and not intended to enable her

to become a permanent resident of Australia”

The Tribunal then went on to consider various decisions in the Administrative Appeals Tribunal and a decision of Fox J in this Court. It concluded that the effect of these decisions was summed up in a dictum in the Tribunal to the following effect:

“... ‘as a matter of common sense’, to use His Honour’s words, he who asserts, or seeks a result, must prove. Such proof must make possible a finding, from the whole of the evidence and on the balance of probabilities, of the facts that are fundamental to a claim.”

This dictum deals with both the incidence of the persuasive burden of proof and the standard to which proofs must rise to justify a finding of fact.

The Tribunal noted the decision of the Full Court in McDonald and said, erroneously, that: “The result flowing from the Court’s dicta however do not appear to be much different from that raised by the decisions referred to above.”. The Tribunal concluded:

“... When the whole of the evidence has been considered against the statutory requirements and a Tribunal is left in a state of uncertainty as to whether the facts necessary to activate the relevant statutory power have been established it must decide against the exercise of the power. In the context of the instant case if having carefully considered the whole of the evidence, the picture is still unclear as to whether there exists an intention to make a ‘genuine’ visit such that the Tribunal on the balance of probabilities is not able to make a finding in this regard then the criterion has not been satisfied and the application for the visa must fail.”

However, the tenor of the decision in Re Ferreras is that, though it may be inappropriate to speak of a party bearing a persuasive burden of proof as does a party to litigation in the courts, the practicalities are that in proceedings in the Tribunal the visa claimant has the onus of proving, on the balance of probabilities, the facts fundamental to satisfying the statutory criteria for the visa and will fail if that is not done. For the reasons given, such an approach is wrong.

It is difficult to know from the reasons given by the Tribunal just how it reasoned its way to its ultimate conclusion against the applicant. But having referred to Re Ferreras, it may well be that it followed the erroneous approach suggested in that case and regarded the applicant as bearing the persuasive burden of proof to the civil standard of all facts necessary to enable the Tribunal to determine whether it was satisfied that the applicant was entitled to the student visa in question.”

37 Mr Horan submitted that the MRT, in the present case, had fallen into exactly the same error regarding the onus of proof as did the IRT in *Huang*. He submitted that:

“... the error in the Tribunal’s approach, and its misunderstanding of the legal principles, cannot be overcome by a “fair reading” of the Tribunal’s reasons for decision. The Tribunal impermissibly imposed on the appellant a persuasive burden in relation to establishing that his relationship with the nominator was genuine and continuing at the time of application. The reference by the Tribunal to “the ‘common sense’ burden of establishing facts” was more than simply “unfortunate”. It is an indication of serious error made by the Tribunal in performing the task entrusted to it.” (footnote omitted)

- 38 Mr Horan next anticipated the reply that the respondent Minister was likely to make, assuming that his primary submission was successful. He recognised that it would be submitted that even if the MRT had fallen into the error identified, it had correctly found that the appellant could not meet the criteria to be satisfied at the time of the decision, under cl 820.221 of Sch 2, which require an applicant for a spouse visa to continue to meet the requirements of the applicable subclause, unless a relevant exception exists. The only relevant exception that could be invoked was that relating to domestic violence. The Minister could be expected to submit that it would be futile to remit this matter to the MRT for rehearing, given that its findings regarding the statutory declarations and the police records were unassailable. In other words, the appellant’s application was certain to be rejected because it could not meet the requirements of reg 1.26 and reg 1.24(2)(a)(ii).
- 39 As previously indicated, the Federal Magistrate did not consider any of the grounds of appeal that related to the statutory declarations and police records. That was because his Honour found no error on the MRT’s part in relation to the burden of proof, and that put an end to the appellant’s case.
- 40 Mr Horan submitted that if the MRT did err by improperly imposing upon the appellant the burden of proof to establish that his relationship with the nominator was genuine and continuing, at the time of the application, the matter should be remitted to the MRT to be heard and determined according to law. He submitted that it would not be futile to remit the matter because the MRT, acting correctly, might well conclude that the requirements regarding the statutory declarations and the police records had been met.
- 41 In that regard, Mr Horan noted that the relevant provisions of the Regulations, and in particular cl 820.221(3) of Sch 2, created an exception to the general requirement that, in order to satisfy the criteria for the grant of a sub-class 820 visa, the applicant must be the

“spouse” of the nominator at the time of decision. Normally, this must be at least two years after the date of application.

42 An applicant will meet the requirements of cl 820.221(3) if the marital relationship is no longer continuing, and, relevantly, “the applicant ... has suffered domestic violence committed by the nominating spouse”: see cl 100.221(4)(c)(i). A reference to a person having suffered, or committed, domestic violence is a reference to a person being taken under reg 1.23 to have suffered or committed such violence. Relevantly, reg 1.23(g) provides that an alleged victim is taken to have suffered domestic violence committed by an alleged perpetrator if the alleged victim presents evidence that meets the requirements of reg 1.24. Regulation 1.24, in its entirety, provides as follows:

“1.24 Evidence

- (1) The evidence referred to in subparagraph 1.23 (1A) (b) (ii) is:*
 - (a) a statutory declaration under regulation 1.25 (which deals with statutory declarations by or on behalf of alleged victims) together with:*
 - (i) a statutory declaration under regulation 1.26 (which deals with statutory declarations by competent persons); and*
 - (ii) a copy of a record of an assault on the alleged victim allegedly committed by the alleged perpetrator, being a record kept by a police service of a State or Territory (other than a statement by the alleged victim); or*
 - (b) a statutory declaration under regulation 1.25, together with 2 statutory declarations under regulation 1.26.*
- (2) A person must not submit, for the purposes of an application that relies on this Division, 2 statutory declarations by competent persons who both have a qualification specified in:*
 - (a) the same subparagraph of paragraph (a) of the definition of **competent person**; or*
 - (b) subparagraph (b)(ii) of that definition.”*

43 The expression “competent person” is defined in reg 1.21(1). That expression includes a medical practitioner, and a social worker.

44 Regulation 1.23(2)(b) provides that in reg 1.23(1)(g):

“1.23 When is a person taken to have suffered or committed domestic violence?

...

(2) *In subparagraph (1A) (b) (ii):*

...
(b) *“a reference to relevant domestic violence is a reference to violence against the alleged victim or his or her property that causes the alleged victim, or a member of the alleged victim’s family, to fear for, or to be apprehensive about, the alleged victim’s personal well-being or safety.”*

45 Mr Horan submitted that under reg 1.24, the evidence required to support a finding that a person is taken to have suffered or committed domestic violence is a statutory declaration by the alleged victim under reg 1.25(1), together with either a statutory declaration by a competent person under reg 1.26, and a copy of a police record of an assault on the alleged victim allegedly committed by the alleged perpetrator, or two statutory declarations by competent persons under reg 1.26.

46 As previously indicated, the MRT found that the statutory declarations of Dr Van Dort and Ms Fraser did not satisfy the requirements of reg 1.26. It will be necessary, therefore, in order to understand Mr Horan’s submissions, to turn to those documents in some detail.

47 Dr Van Dort made his statutory declaration on 12 August 1999. He stated that on 28 June 1999, he had attended a man who identified himself as the appellant. The man related having problems with his wife, an Aboriginal lady with an alcohol problem. He stated that when under the influence of alcohol, which was most of the time, she was violent towards him, and to his property. He said that he had reported the matter to the police, and showed Dr Van Dort a police report. He also showed Dr Van Dort photographs of two cars which showed the windows and front and rear windscreens damaged. The man was distressed, and Dr Van Dort felt that he was depressed. He prescribed medication. Prior to that visit, Dr Van Dort had never met the appellant. In his own words, “the history is wholly as he related it to me”.

48 Mr Horan submitted that it was “implicit” in Dr Van Dort’s statutory declaration that he was of the opinion that the appellant had suffered domestic violence, and that the nominator had committed that violence.

49 Ms Fraser made two statutory declarations. The first on 9 August 1999, and the second on 12 December 2003.

50 In the first statutory declaration she stated that she had seen the appellant, in her capacity as a counsellor at the Curtin University Counselling Services on 5 July 1999. Mr Ejueyitsi had presented her with a written referral from Dr Van Dort requesting that the University Counselling Services provide “counselling and guidance”. In her own words, Ms Fraser said:

“Mr Ejueyitsi presented to me with symptoms of stress related to what he defined as a situation of domestic violence. Mr Ejueyitsi claimed to have been subjected to physical and emotional abuse by his wife Nola.

Mr Ejueyitsi was given assistance in the area of stress management and was offered a further counselling appointment with me as required”.

51 In her second statutory declaration, dated 9 August 1999, Ms Fraser stated:

“When Mr Ejueyitsi consulted me on 5 July 1999, he referred to 2 specific incidents of domestic violence committed against him by his wife Nola, the first incident involved Nola violently and extensively damaging 2 cars belonging to him, the second incident involved Nola threatening him with a knife. There were other more general comments made by him with respect to Nola’s behaviour.

I confirm that both now and at the time I made the declaration on 9 August 1999 I was and am currently recognised by the Australian Association of Social Workers as eligible to be a member of that Association. I further confirm that in seeing Mr Ejueyitsi on referral and in providing my previous declaration I was performing the duties of a social worker.”

52 Once again, Mr Horan submitted that it was “implicit” in Ms Fraser’s two statutory declarations that she was of the opinion that the appellant had suffered domestic violence committed by the nominator. He submitted that in considering whether a statutory declaration contains the requisite opinion, it must be read fairly, and should not be “scrutinised over-zealously with a view to detecting some inadequacy of expression from which error may be imputed”: see *Kozel* at [30] per Ryan J. He submitted that in many, if not most, cases, the competent person would have no direct knowledge of the applicant’s relationship with his or her spouse, and would therefore be in no position to do other than recount the history given by that person. Even if there were objective signs of violence having been inflicted, it would be difficult for a doctor, or a social worker, to proffer an opinion that the injuries in question had been inflicted in the course of domestic violence, still less that a particular person had inflicted them. He submitted that the Regulations should be construed benevolently, having regard to their evident purpose, which was to allow persons

who had been subjected to domestic violence, and forced to live apart, to maintain a claim for a spouse visa. He further submitted that the Regulations should not be construed so as to require the competent person to act as an investigative, or fact finding body, a task which many such persons would either eschew, or not be qualified to undertake.

53 In that regard, Mr Horan submitted that Dr Van Dort, in his statutory declaration, had stated that he had been given an account of the domestic violence suffered by the appellant, and committed by the nominator, and that he had been shown corroborating evidence in the form of police reports and photographs. It was in that context that Dr Van Dort stated that the appellant “was distressed and I feel that he was depressed”. In those circumstances, Mr Horan submitted, it was by no means difficult to infer that Dr Van Dort was stating an opinion that the appellant had suffered domestic violence, as required by reg 1.26, and that he held the opinion that this had been inflicted by the nominator. The same could be said of Ms Fraser’s statutory declarations.

54 Mr Horan noted that the conduct of the nominator, as described by the appellant, was capable of amounting to domestic violence within the meaning of the Regulations. It involved violence against the appellant’s property, and at least the implicit threat of violence against him. It must have caused him to fear for, or to be apprehensive about, his personal well-being or safety.

55 Mr Horan submitted that, in the event that only one of the statutory declarations met the relevant requirements, the MRT erred in finding that the police records (consisting of a computer system despatch extract, and a handwritten action report) did not fall within reg 1.24(a)(2) because those records did not refer to any assault upon the appellant.

56 The computer system despatch extract refers to a complaint on 24 May 1999 at 2.13am. It is brief in the extreme. It merely states that the complainant “was woken by his [redacted] with a knife in [redacted] hand”. It goes on to say that someone, or something (the letters “APP” appear), “has caused a lot of damage at the house and that the complainant ran out and rang from a phone box”.

57 Although words have been redacted from the copy of the computer system despatch extract, obtained under freedom of information legislation, Mr Horan submitted that it could readily

be inferred that the complaint was about the nominator. That conclusion was said to be open on the basis that the incident had occurred in the home at 2.13am. Moreover, there appeared to be no record, on the document, of any follow up investigation, a common characteristic of complaints involving domestic violence. Mr Horan submitted that, on any view, the concept of an assault extends to conduct which causes a person to fear physical violence. An attack upon two vehicles which causes substantial damage, in the presence, actual or constructive, of the appellant, could, on that basis, constitute an implied threat, and therefore an assault at common law.

58 The handwritten action report described the steps taken by the police who attended at the premises in the early hours of 24 May 1999. The report said that the police spoke to the appellant and his wife “who had been arguing over an alleged affair and decided to separate”. It said that the wife had damaged two vehicles prior to their arrival. It recorded that the appellant had collected some of his property, and then proceeded to drive to a friend’s house.

59 Mr Horan submitted that if either the computer system despatch extract, or the action report, did in fact fall within reg 1.24(1)(a)(ii), there would only need to be one statutory declaration from a competent person in order to satisfy 1.24(1)(a).

THE RESPONDENT’S CONTENTIONS ON APPEAL

60 Ms Riley, who appeared on behalf of the Minister, submitted that the notice of appeal filed in this Court appeared to challenge the decision of the Federal Magistrate only in relation to the MRT’s finding that the relationship between the appellant and the nominator was not genuine and continuing, at least at the time of the application. She submitted that the appellant could not succeed in the appeal to this Court on that basis alone, and that it would also be necessary to show that “the court below, and the Tribunal, erred in relation to the statutory declarations and police records”.

61 Ms Riley noted that the Federal Magistrate had expressly refrained from considering the correctness or otherwise of the MRT’s findings regarding the statutory declarations, and the police records. She submitted that his Honour had rightly refrained from dealing with these matters, having regard to his conclusion that the MRT had not erred in relation to the issue of burden of proof.

62 It may be interpolated, at this point, that it is difficult to see how the appellant could sensibly be expected to include, in his notice of appeal to this Court, a challenge to anything that his Honour did in relation to the statutory declarations and police records. All that his Honour determined was that it was not necessary to say anything about the MRT's reasoning regarding these matters.

63 This Court exercises appellate functions over the Federal Magistrates Court. In order to succeed on an appeal, an appellant must demonstrate error on the part of the court below. The only "error", that can conceivably be discerned in his Honour's treatment of the grounds of review concerning the statutory declarations and police records was his failure to determine the burden of proof ground in favour of the appellant. That, in turn, would have required his Honour to consider the remaining grounds of review.

64 In any event, Ms Riley submitted that in order to enable the appellant to deal with the correctness or otherwise of the MRT's findings regarding the statutory declarations and police records on this appeal, Mr Horan ought to seek leave to file an amended notice of appeal. She added that the Minister would not oppose such leave being granted.

65 On the primary point of substance, Ms Riley submitted that the MRT had made its finding that the appellant had not been in a genuine and continuing spousal relationship at the time of the application without impermissibly imposing any burden of proof upon him.

66 Ms Riley accepted that the notion of proof, as understood in a curial sense, has no role to play in an administrative decision in which the decision maker is asked to be satisfied of a certain matter. However, she submitted that it was also true, as a matter of practical reality, that the decision maker would not be able to be satisfied of a particular matter if there was no evidence, or other material, regarding an important issue, before the decision maker. She referred, in that regard, to *Minister for Immigration and Multicultural and Indigenous Affairs v VSAF of 2003* [2005] FCAFC 73 ("*VSAF*"), a case in which the applicant had not attended before the Refugee Review Tribunal. In that case, the Full Court saw no error in the Tribunal having proceeded to make its decision without taking any further steps to enable him to attend. The absence of any evidence in support of the applicant's claim enabled the Tribunal to find that it was unable to be satisfied that he had a genuine fear of persecution, or that he had experienced any particular mistreatment or harm.

67 Ms Riley submitted that, in the present case, the MRT's reference to the "common sense" burden, in [40] of its reasons for decision, meant no more than that it could not be satisfied, in the absence of sufficient evidence, that the appellant and the nominator were in a genuine and continuing spousal relationship. It did not mean that the MRT had decided the case on the basis of some failure to discharge a curial onus of proof.

68 In that regard, Ms Riley sought comfort in the well-known passage from the judgment of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

69 Ms Riley noted that, at [37] of its reasons, the MRT had correctly acknowledged that an administrative tribunal should not seek to determine matters by the application of the rules related to burden of proof. She submitted, however, that where an applicant asks the MRT to be satisfied about an aspect of his personal situation, in circumstances where the MRT is under no obligation to seek out material for itself, and there is no opposing party, the only realistic source of material upon which the MRT can achieve the required state of satisfaction is the applicant himself.

70 Ms Riley next referred to the following passage in *VSAF*, at [17]:

"We are unable to agree with his Honour's statement that "in the absence of findings as to the facts, either favourable or unfavourable to the [respondent], the Tribunal could not reach the requisite state of satisfaction, or the requisite state of non-satisfaction": see [9]. As s 65 and Wu Shan Liang make clear, the section requires a visa to be rejected in the absence of a positive finding of satisfaction. It does not require the visa to be granted in the absence of an adverse finding. There are many cases showing that findings of fact are not necessarily required to support a state of non-satisfaction. In SJSB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 225 the Tribunal found that the applicant's claims were at "such a general and vague level that the Tribunal cannot establish the relevant facts", and therefore had made no findings either accepting or rejecting the claims. The Tribunal's approach was upheld by a Full Court at [15]:

"It can be seen from the form of [s 65(1)] that it does not require the decision-maker to reach a decision to refuse to grant a visa only if a particular matter is established. Rather, it requires a refusal if the decision-maker is not affirmatively satisfied that the criteria for the visa in question have been satisfied."

See also NAQR v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1033 at [33] and Applicant A159 of 2003 v Minister for

Immigration and Multicultural and Indigenous Affairs [2004] FCA 473.”

- 71 Ms Riley submitted that if the appellant did not put before the MRT material sufficient to enable it to be satisfied of a requisite matter, his visa application had to be rejected. She submitted that in the present case, the MRT, though satisfied that the appellant and nominator had “some form of relationship”, expressly stated that it was not satisfied that they had been in a genuine and continuing relationship at the time of the application. She submitted that there was nothing in the MRT’s reasoning on this issue that suggested it had misunderstood its statutory task. On the material, it was open to the MRT to arrive at the conclusion that it did.
- 72 Ms Riley recognised that she might be in some difficulty with regard to the burden of proof issue. She frankly acknowledged that the MRT’s language had been unfortunate, and that it had been unwise to speak of the appellant having not discharged the “common sense burden” of establishing the facts necessary to enable it to reach a finding on the critical issue. However, she submitted that when the MRT used this terminology, it had merely expressed itself infelicitously, and had done no more than what *VSAF* expressly contemplated and approved.
- 73 With regard to the statutory declarations, Ms Riley submitted that there was nothing implicit in them that suggested that the competent person held the opinions required under reg 1.26. She referred to *Ibrahim* at [40] where Wilcox J observed that if the visa applicant fails to obtain appropriate statutory declarations by the required two competent persons, the visa application has to be refused. That is so even if the decision maker is totally satisfied that the applicant has suffered domestic violence at the hands of his or her spouse.
- 74 Ms Riley also referred to *Du v Minister for Immigration & Multicultural Affairs* [2000] FCA 1115, where Mathews J said at [18]-[19]:

“The Regulations are in quite specific and peremptory terms. It is not sufficient compliance, in my view, with these Regulations for a competent person simply to note the consistency between a person's presentation and their account of domestic violence, or even the occurrence of domestic violence. The Regulations require that the competent person express an opinion in very specific terms, namely, as to whether relevant domestic violence as defined in reg 1.23 has been suffered by a person.

This involves not only an opinion that past acts of violence have occurred but also an assessment of the state of mind of the alleged victim. None of this has been complied with here.”

75 Finally, Ms Riley referred to *Alin v Minister for Immigration and Multicultural Affairs* [2002] FCA 979 at [13] where Sundberg J indicated that he agreed with what Mathews J had said in *Du*. His Honour said, at [12], that the statutory declarations under consideration in *Alin* did not satisfy the Regulations because they made “no reference to the applicant’s state of mind, namely that the violence caused the applicant to fear for or be apprehensive about his personal well-being or safety”, that being a component of the definition of “relevant domestic violence” in reg 1.23(2)(b).

76 Ms Riley very properly drew attention to the observations of Ryan J in *Meroka*, where his Honour said at [33] and [34]:

“That is not to say that the Minister (or the Tribunal) can substitute for that of the “competent person”, his or its own opinion of whether domestic violence has been suffered. ...

I do not consider that the competent person need state expressly that in his or her opinion relevant domestic violence has been suffered. The requisite statement of opinion may be conveyed by implication having regard to the way in which the standard form directs the attention of the competent person to the definition of “domestic violence” in reg 1.23(2)(b).”

77 However, she noted that in *Alin*, Sundberg J had distinguished *Meroka* on the basis that the standard form, which had been used in *Meroka*, had not been used in *Alin*. Where the standard form was not used, it was necessary, in Sundberg J’s view, for the requisite opinion to be expressly stated. Ms Riley noted that the standard form had not been used in the present case.

78 In these circumstances, and relying upon both *Du* and *Alin*, Ms Riley submitted that even an implicit expression of opinion, of the kind for which Mr Horan contended, would not be sufficient. The requisite opinion would have to be clearly expressed.

79 However, Ms Riley went further and submitted that even on a generous view, the requisite opinion was not implicit in any of the statutory declarations relied upon by Mr Horan. Dr Van Dort merely considered that the appellant was depressed, and he prescribed medication

for that condition. However, he did not offer any opinion, express or implied, as to what had caused that depression. More specifically, he did not express any opinion to the effect that the appellant had suffered domestic violence at the hands of the nominator.

80 Likewise, Ms Fraser simply recounted what she had been told by the appellant. At no stage did she indicate that she believed what he said to be true. Nor did she indicate that she had formed a professional opinion that he had been the victim of domestic violence that had caused him to be fearful for his well-being or safety, still less that this violence had been committed by the nominator.

81 Finally, Ms Riley submitted that neither of the police records described what could be regarded as an assault upon the appellant. The first record was merely a despatch record. It said nothing about his having been assaulted. The second record said that there had been an argument over an alleged affair, and that the nominator had damaged two vehicles. It did not indicate that the appellant had been attacked, or even put in fear of being attacked. Indeed, Ms Riley went so far as to submit that there was no indication that the damage inflicted upon the vehicles was deliberate, or done in the appellant's presence. She submitted that there was nothing to indicate that anything that took place might have left the appellant feeling in any way threatened.

CONCLUSIONS

82 It is difficult to distinguish the reasoning of the MRT that is impugned in the present case from that of the IRT, which was held by Drummond J, in *Huang*, to be flawed. Indeed, in both cases, the relevant tribunal adopted precisely the same formulation of the law governing the burden of proof in administrative review: see *Huang* at [22], and compare [38] of the MRT's reasons for decision.

83 Ms Riley submitted that *Huang* did not decide, as a matter of ratio, that the language used by the IRT in that case demonstrated that it had determined the case erroneously, on the basis that the applicant carried a persuasive burden of proof. That was because Drummond J went on to find that the IRT's reasons for decision were also erroneous in other respects, and his Honour did not specifically state that the application for review, that was granted, was allowed on the basis of a mistaken allocation of the burden of proof.

84 I am not persuaded by this submission. Drummond J made it abundantly clear, in *Huang*, when he concluded that there was reviewable error under s 476 of the *Migration Act 1958* (Cth), that the IRT's entire approach to the burden of proof was misconceived. The fact that his Honour found several additional errors in the IRT's reasons for decision, any one of which would have been sufficient to vitiate that decision, does not mean that what he had to say about its treatment of the burden of proof amounted to mere dicta.

85 In any event, even if Drummond J's observations were dicta, they were certainly carefully reasoned, and are worthy of serious consideration. The principle of comity would suggest that I should follow his Honour's analysis unless persuaded that it was wrong. Far from being so persuaded, I consider what his Honour said to have been correct.

86 Ms Riley then submitted that there was an inconsistency between *Huang* and *VSAF*. If that were so, I would plainly be bound by *VSAF*, that being a decision of the Full Court. However, in my view, there is no such inconsistency. In the present case, the MRT analysed the evidence before it through the prism of the burden of proof. In *VSAF*, there simply was no evidence upon which the MRT could be satisfied of the requisite matters.

87 Of course, the MRT in this case had to be satisfied of the various matters set out in the Regulations before it could grant the appellant the spouse visa that he sought. However, it is one thing to recognise that a statute requires that a state of satisfaction be reached. It is altogether another thing to approach the question whether such satisfaction has been achieved by asking whether an onus of proof has been discharged. The latter reflects an approach that is curial, rather than inquisitorial. As *Huang* makes plain, a decision maker who adopts such a curial approach asks the wrong question.

88 Ms Riley's submission that *Wu Shan Liang* should be invoked to salvage the MRT's decision, despite its "unfortunate" use of language, has a powerful resonance. There are many cases, where decisions by administrative tribunals have been affirmed, despite lapses in the language used when addressing matters of "proof". However, a great deal must depend upon the particular circumstances of any given case. Some cases will cross the line, and irredeemably reveal jurisdictional error.

89 In my view, the observations of Drummond J at [20] in *Huang* regarding *Wu Shan Liang*

apply with equal force to the present case. The MRT was plainly confused about the distinction between the onus of proof in curial proceedings, and how a decision maker determines facts in administrative review. That confusion was most clearly manifested by its discussion at [40] of its reasons for decision. The reference to “common sense” (which is in fact a term used to explain the axiom that “he who asserts must prove”, in a curial context), was invoked by the MRT, mistakenly, to explain, and justify, a finding made in an entirely different, and purely administrative context.

90 The MRT’s role in satisfying itself as to various matters has nothing whatever to do with a “common sense” burden of establishing the facts necessary to enable it to reach a finding on “the critical issue”. There is no such burden, whether derived from “common sense”, or anywhere else. The only statutory requirement is that the MRT satisfy itself of the requisite matters.

91 Subject to what *VSAF* had to say regarding the meaning of the term “satisfy” (in the context of a proceeding in which the applicant did not attend the hearing that had been arranged so that he could present his case, and therefore put no material to the relevant tribunal in support of that case), it is plainly wrong for a decision maker to approach an application for merits review by considering whether a persuasive burden of proof has been discharged.

92 I should add that I do not understand the MRT, in the paragraphs that are impugned, to have been endeavouring, in an incomplete way, to distinguish between a legal and evidential burden of proof. Nor do I understand it to have embarked upon an analysis grounded in the mysteries of presumptions of law and fact, and any differences that arise between them. Its error was more fundamental than that, and simply reflected confusion on its part as to how the process of administrative review was to be conducted.

93 It follows that I disagree, with respect, with the learned Federal Magistrate who concluded that the MRT’s decision, though somewhat confused, could nonetheless be saved by application of the principles set out in *Wu Shan Liang*. His Honour did not have the benefit, as I did, of being referred to the judgment of Drummond J in *Huang*. Had that case been drawn to his attention, he may well have come to a different conclusion. I would therefore uphold the various grounds of appeal that raise the MRT’s treatment of the burden of proof as the basis for challenge.

- 94 However, that of itself does not mean that the appeal must succeed. There is still the question whether it would be futile to remit this matter to the MRT (which is the relief for which the appellant primarily contends), or alternatively to the Federal Magistrates Court to complete its consideration of the grounds of review that were not dealt with.
- 95 The issue of futility arises because, as the Minister quite properly notes, the evidence makes it clear that whatever may have been the position at the time the application for a spouse visa was lodged, by the time of the MRT's decision, the appellant and the nominator were not in a genuine and continuing spousal relationship. That meant that the appellant would have to bring himself within the domestic violence exception in Div 1.5 of the Regulations. According to Ms Riley, he could not do so because, as the MRT correctly found, he did not meet the requirements of the Regulations regarding statutory declarations, and police records.
- 96 If I were satisfied that the appellant could not conceivably bring himself within the domestic violence exception, having regard to the MRT's findings in relation to the evidence regarding this matter, I would deny relief in the exercise of my discretion. However, I am not so satisfied.
- 97 In the first place, the appellant sought review, in the Federal Magistrates Court, of the MRT's decision, not just in relation to its treatment of the burden of proof, but also in relation to its findings regarding the statutory declarations and police records. For reasons that have already been explained, that process of review was never completed in relation to these matters.
- 98 Ms Riley submitted that this Court was in as good a position as the Federal Magistrates Court had been to determine whether there was any merit in the appellant's submissions regarding the statutory declarations and police records. In one sense, that is true. The issues raised are essentially questions of law. However, it is important to bear in mind that those issues are not actually before this Court. There is nothing in the notice of appeal that challenges the findings of the MRT regarding these matters, and the Federal Magistrate did not deal with them. The only basis upon which they have been agitated before me is in anticipation of an argument by the Minister that it would be futile to remit this case, and accordingly, that relief should be refused in the exercise of the Court's discretion.

99 I am unable to accept Ms Riley’s submission that the appellant cannot conceivably bring himself within the domestic violence exception. Indeed, it seems to me that in at least one respect, namely Mr Horan’s submission regarding the police records, the appellant has an eminently arguable case. I find it difficult to understand how the MRT could have concluded that the police records, whether viewed separately, or in conjunction with each other, did not contain a report of an assault. If pressed, I would infer that the MRT may have adopted too narrow a view of what constitutes an assault. In any event, it seems to me, without saying more, that this aspect of the appellant’s case is anything but hopeless.

100 The appellant’s submissions regarding the statutory declarations obviously face significant hurdles. Nonetheless, an argument can be put to the effect that the MRT erred in its treatment of this issue. Much will depend upon whether the approach taken by Ryan J in *Meroka*, which recognises the possibility that a statutory declaration may state an opinion “implicitly”, is good law.

101 In particular, the question may arise as to whether the distinction that Sundberg J drew in *Alin* between a statutory declaration on a form approved by the Department, which may contain implicit statements of opinions, and a declaration not in that form, which may not, is correct. It is fair to say that Sundberg J referred to the difference between the form used in *Meroka*, and that used in *Alin*, as a basis for distinguishing *Meroka*. However, his Honour did not explain, in any detail, why the difference in the form of the declarations used warranted a different result, at least in terms of whether an opinion could be “implicit”. It is arguable that the broader and more flexible approach taken by Ryan J in *Meroka* was not intended to be so constrained.

102 It is also arguable that the gloss that Sundberg J placed upon reg 1.26, in [12] of *Alin*, namely that the competent person must indicate that he or she “was aware of the definition of domestic violence in reg 1.23(2)(b)”, and refer to “the applicant’s state of mind, namely that the violence caused the applicant to fear for or be apprehensive about his personal well-being or safety” is not warranted by the terms of the regulation itself.

103 In any event, it seems to me that these issues are not properly ones for me to determine. They do not arise directly under the notice of appeal. Their only relevance lies in whether relief should be refused on the basis of futility. For the reasons already given, I do not think that

remittal would be futile.

- 104 The question that next arises is, to which body should this proceeding be remitted? As previously indicated, Mr Horan submitted that the matter should be remitted to the MRT. That would have the obvious advantage, for the appellant, of allowing him the opportunity to file further statutory declarations that may meet the formal requirements of reg 1.26. That assumes, of course, that such statutory declarations would be forthcoming. That is an assumption that perhaps should not too readily be made. It may be difficult to persuade a competent person to express the opinions set out in that regulation, at least in circumstances where the declarant has no actual knowledge of the facts said to amount to domestic violence.
- 105 Of course, once the formal requirements associated with the statutory declarations are met, the Regulations do not require or permit the MRT to come to any decision as to whether domestic violence actually took place. The scheme is one of deeming provisions, and as Wilcox J pithily observed, represents a “triumph of form over substance”.
- 106 Ms Riley submitted that if I were to conclude that the appeal should be allowed because of what the MRT had said regarding the burden of proof, and if I were not persuaded that it would be futile to remit the matter for further consideration, it ought to be remitted to the Federal Magistrates Court, and not to the MRT. That was because the challenge to the validity of the MRT’s decision, regarding the statutory declarations and the police records, had not been determined. The application for judicial review before the Federal Magistrates Court, therefore, had still to be completed.
- 107 I infer that it did not escape Ms Riley’s attention that remittal to the Federal Magistrates Court, rather than the MRT, might preclude the appellant from seeking to rectify any defects associated with the statutory declarations by filing new ones.
- 108 In the end, I think that Ms Riley’s submission that this matter should be remitted to the Federal Magistrates Court, rather than the MRT, should be accepted. I say that not because this would be tactically advantageous to either side. Rather, it seems to me that when an appeal from the Federal Magistrates Court is allowed, as this appeal will be, this Court should ordinarily make the orders that the Federal Magistrates Court itself ought to have made. However, where the Federal Magistrates Court has not completed its task of judicial review,

as is the position in the present case, then as a general rule, it ought to be required to do so.

109 It follows that the appeal will be allowed. The decision of the Federal Magistrate dismissing the application for review, and his Honour's order that the appellant pay the respondent's costs, will be set aside. In lieu thereof, the matter will be remitted to the Federal Magistrates Court to be dealt with according to law. The costs of the previous proceeding before the Federal Magistrate, together with the future costs of that proceeding, will be reserved.

110 With regard to the costs of this appeal, the respondent should pay those costs.

111 In accordance with the High Court's decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162, the MRT has been joined as a respondent to this proceeding.

I certify that the preceding one-hundred and eleven (111) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Weinberg.

Associate:

Dated: 4 April 2006

Counsel for the Appellant: Mr C Horan

Solicitor for the Appellant: Goz Chambers Lawyers

Counsel for the Respondent: Ms Riley

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 21 March 2006

Date of Judgment: 4 April 2006